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No. 89-6332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT S. MINNICK,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE MISSISSIPPI STATE BAR IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Mississippi State Bar respectfully petitions this Court for leave to file the attached brief *amicus curiae* in support of petitioner.

The Mississippi State Bar is a unified bar, encompassing every person licensed to practice law in Mississippi. The Bar was founded in 1909 as a voluntary bar, and became a unified bar in 1932 as a result of action by the state legislature. The Bar has more than 5,700 active members, approximately 4,800 of whom reside in Mississippi.

The Bar functions as the disciplinary arm of the Mississippi Supreme Court, and is thus directly responsible for ensuring that lawyers in Mississippi adhere to the ethical canons and rules governing the legal profession.[1]

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[1] The Model Rules of Professional Conduct have been in force in Mississippi since July 1, 1987. From 1971 until June 30, 1987—

This duty encompasses a broader responsibility on the part of the Bar to maintain the integrity of—and public confidence in—the legal profession in the State of Mississippi.

The Bar's interest in the present case stems from these responsibilities. Although resolution of this case depends on principles of constitutional law and not the canons of professional ethics, the Bar believes that consideration of the ethical rules applicable to the present facts can contribute to a proper resolution of the decisive constitutional questions. The Bar also seeks the opportunity to urge that the constitutional questions in this case be resolved in a way that does not undermine relevant ethical prohibitions, and that does not diminish the integrity of the profession and the adversary process.

For the foregoing reasons, the Mississippi State Bar urges this Court to grant its motion and accept for filing the attached brief *amicus curiae*.

Respectfully submitted,

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the period encompassing the events at issue in this case—the Code of Professional Responsibility was in force.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-6332

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BRIEF AMICUS CURIAE OF THE MISSISSIPPI STATE BAR IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The interest of *amicus* is set forth in the accompanying motion for leave to file a brief *amicus curiae*.

STATEMENT

This case raises important Fifth and Sixth Amendment issues about the extent to which prosecutors and police officers are obliged to respect a criminal suspect's decision to communicate with them only through counsel. Ethical principles that govern the conduct of all attorneys —including prosecutors—do not control these constitutional issues, but can shed considerable light on their proper resolution. In particular, the longstanding ethical rule prohibiting direct communication between an attorney and an adverse party highlights the grave risk of overreaching that inheres in a direct confrontation

between prosecutorial authority and an individual suspect unassisted by counsel. In the judgment of *amicus*, therefore, relevant ethical principles strongly suggest that the constitutional analysis of the Mississippi Supreme Court in this case was wrong and should be reversed.

The material facts, as set forth in the opinion of the Mississippi Supreme Court, are largely undisputed.[2] Petitioner Minnick was arrested and taken into custody in late August 1986 by officials in San Diego, California, on the authority of arrest warrants charging Minnick with having committed murder in Mississippi. On August 23, 1986, agents of the Federal Bureau of Investigation interrogated Minnick while he was held in custody in San Diego. Minnick was advised of his Fifth Amendment rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), and explicitly declined to waive those rights. Minnick responded to some initial questions from the agents, but then demanded the assistance of counsel: he informed the agents to "come back Monday when I have a lawyer." Following established FBI procedure and this Court's dictate in *Edwards v. Arizona*, 451 U.S. 477 (1981), the agents immediately ceased their questioning. Sometime after the end of this interrogation but before August 25th, counsel was appointed for Minnick and spoke with Minnick a few times.

On August 22, 1986, Deputy J.C. Denham—the Chief Investigator of the Clarke County, Mississippi Sheriff's Department—received word from San Diego authorities that Minnick had been taken into custody. Denham flew to San Diego on August 24th, and interrogated Minnick on August 25th. When Denham arrived at the jail where Minnick was still in custody, the San Diego authorities "told Minnick that he would *have to* go down

[2] The facts set forth in this brief are drawn from the opinion of the Mississippi Supreme Court. *Minnick v. State*, 551 So.2d 77 (1988).

and talk to Denham." 551 So.2d at 82 (emphasis added). No effort was made to let Minnick's appointed lawyer know that interrogation was to recommence.

Denham asked Minnick to sign a written statement waiving his rights, but Minnick refused. Denham then asked Minnick whether he wanted to talk about the murders in Mississippi, and Minnick again refused. However, because Denham and Minnick had a long acquaintance, Denham was able to sustain a general conversation with Minnick. When Denham inquired about a prison escape, Minnick replied by stating "it's been a long time since I've seen you." According to Denham's notes, Minnick then described his escape, and eventually confessed to the murders allegedly committed in the course of that escape. After doing so, Minnick again invoked his Fifth Amendment rights and refused to speak further. Denham left the room and transcribed his version of the interrogation. Minnick refused to sign Denham's handwritten description of the alleged confession.

Minnick subsequently was tried in Mississippi for capital murder, convicted and sentenced to die. Denham's version of Minnick's statement was the centerpiece of the State's case at trial. Counsel for Minnick sought to have the testimony excluded on the ground that it was obtained in violation of Minnick's rights under the Fifth and Sixth Amendments to the Constitution of the United States. Finding that the statement was freely given and that Minnick had knowingly and intelligently waived his constitutional rights, the trial court denied the motion.

The Mississippi Supreme Court affirmed. The court held that Minnick's Fifth and Sixth Amendment rights were not violated by Denham's interrogation, despite this Court's repeated injunction that "interrogation must cease" when a defendant in custody requests the assistance of counsel. *See Michigan v. Jackson*, 475 U.S. 625

(1986); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

The court analyzed the Fifth and Sixth Amendment issues separately. With respect to the Fifth Amendment, the court acknowledged that *Edwards v. Arizona* set forth a bright-line rule precluding interrogation of a suspect who requests counsel unless counsel is present or the suspect initiates further discussion. But the court found the rule inapplicable here because Minnick had consulted with counsel before the renewed interrogation. This consultation, in the court's view, "satisfied" the Fifth Amendment. 551 So.2d at 83.

With respect to the Sixth Amendment, the court ruled that even though Minnick's right to counsel had attached by the time of Denham's interrogation, Minnick's informed decision to discuss matters with Denham constituted a knowing and intelligent waiver. 551 So.2d at 84. The court did not mention this Court's ruling in *Michigan v. Jackson*, which extended the rule of *Edwards* to interrogations that occur after a suspect's Sixth Amendment right to counsel has attached.

At bottom, the Mississippi Supreme Court held that neither the Fifth nor the Sixth Amendment preclude police-initiated interrogation of a defendant in custody who has had invoked the right to counsel, so long as the defendant has had some opportunity to consult with counsel prior to resumption of interrogation. Defense counsel need not be present during the renewed interrogation, or even be informed that such interrogation is to occur.

Justice Robertson dissented. In his view, the renewed interrogation by Deputy Denham violated familiar Fifth and Sixth Amendment principles precluding interrogation of a suspect who has requested counsel. Justice Robertson argued that the police-initiated interrogation in this case should have been held unconstitutional for reasons akin to those underlying the rule of legal ethics

prohibiting an attorney from communicating directly with an adverse party represented by counsel:

> We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. . . . We regard this rule as a fair one. Its genesis lies in our concern with fairness. That the third party has a lawyer is taken as an expression of his wish to be dealt with only through counsel. There is substantial probability of the party being overreached when his lawyer is not there. The integrity of the lawyer-client relationship is at stake.

551 So.2d at 101-102 (Robertson, J., dissenting).

This Court granted certiorari on April 23, 1990.

ARGUMENT

This case implicates both the Fifth and Sixth Amendment rights of petitioner Minnick. There is no dispute that Minnick was in custody at the time of the interrogation, and therefore entitled to the Fifth Amendment protections set forth in *Miranda v. Arizona*, including the assistance of counsel to protect his right against self-incrimination. Nor is there any dispute—as the Mississippi Supreme Court found and respondent conceded,[3] 551 So.2d at 83—that under Mississippi's understanding of its criminal process, Minnick's Sixth Amendment right to counsel had attached by the time of Denham's interrogation.[4]

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[3] *See* Brief of Appellee in *Minnick v. State*, at 3 ("It is also evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview since warrants for his arrest had been issued").

[4] Although this finding of the Mississippi Supreme Court (and this concession by respondent) would appear to foreclose further debate on the issue, the attachment of the Sixth Amendment right to counsel is not critical to the separate and analogous Fifth Amend-

To ensure that a suspect's assertion of Fifth Amendment rights is respected by the police and not undermined through repeated attempts at custodial interrogation, the Court held in *Edwards v. Arizona* that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights." 451 U.S. at 484. In *Michigan v. Jackson*, the Court extended the *Edwards* rule to the Sixth Amendment context: "if police initiate interrogation after a defendant's assertion . . . of his [*Sixth Amendment*] right to counsel, *any* waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636 (emphasis added).

This case involves the proper scope of these constitutional protections. Drawing on an isolated phrase taken out of context from this Court's opinion in *Edwards*, the Mississippi Supreme Court concluded that Minnick's Fifth and Sixth Amendment rights were not violated by *police-initiated* interrogation occurring in the absence of Minnick's appointed lawyer—even though Minnick had requested that counsel be present during interrogation and repeatedly refused to waive his rights—because Minnick consulted with his lawyer prior to the resumption of interrogation.[5]

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ment issue presented in this case, and does not affect the applicability of the ethical constraints *amicus* will discuss.

[5] The phrase on which the Mississippi Supreme Court relied is included in the following passage:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges or conversations with the police.

451 U.S. at 484-485. The context makes clear that the Court in *Edwards* had no intention of fashioning a rule permitting the police to initiate renewed custodial interrogation of a suspect who requested counsel, merely because the suspect had some opportunity to consult with a lawyer.

The precise issue for this Court, therefore, is whether, under *Edwards v. Arizona* and *Michigan v. Jackson*, a suspect who has requested counsel may be subjected to renewed (and potentially repeated) interrogation without counsel present, so long as the suspect has had the opportunity to consult with counsel prior to the renewed interrogation. Resolution of this question turns on whether prior *consultation* with counsel suffices to protect a suspect's Fifth and Sixth Amendment rights during custodial interrogation, or whether the *presence* of counsel during interrogation is essential once a suspect has decided that he or she is not able to deal with the authorities without the assistance of a lawyer. In the judgment of *amicus*, ethical principles governing attorney conduct, though not controlling, can provide substantial guidance in resolving that question.

1. To determine whether counsel's presence is necessary to protect the constitutional rights at stake, counsel's role during custodial interrogation must be examined. As the Court made clear in *Patterson v. Illinois*, the scope of the right to counsel depends on "what purposes a lawyer can serve at a particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." 487 U.S. 285, 298 (1988). The Fifth Amendment right to counsel exists to protect a suspect against compelled self-incrimination in the inherently coercive setting of custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444-445. The Sixth Amendment right to counsel, though broader, at a

minimum includes protection against compelled self-incrimination.[6]

Although consultation with counsel can provide meaningful assistance to a suspect in custody, consultation alone cannot ensure that a defendant will make an uncoerced and wholly voluntary choice whether to speak with the police or to remain silent in the face of custodial interrogation. As this Court has recognized repeatedly, a request for counsel raises a presumption that the suspect "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Arizona v. Roberson*, 108 S. Ct. 2093, 2099 (1988); *accord Michigan v. Mosely*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result). Counsel's *presence* during custodial interrogation is therefore vital. *Arizona v. Roberson* makes clear that the "right against self-incrimination . . . is protected by the prophylaxis of *having an attorney present* to counteract the inherent pressures of custodial interrogation." 108 S. Ct. at 2100 (emphasis added); *see also Edwards v. Arizona*, 451 U.S. at 484-485; *Miranda*, 384 U.S. at 444-445.[7]

Meaningful assertion of the right to remain silent "often depends upon legal advice from someone who is trained and skilled in the subject matter," because "a layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege." *Estelle v. Smith*, 451 U.S. 454, 471 (1981). For

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[6] The Sixth Amendment embodies "a realistic recognition that the average defendant does not have the professional legal skill to protect himself," and thus needs assistance when confronting a skilled advocate with antagonistic objectives. *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938).

[7] As the Court made clear in *Miranda*:

> "If an individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney *and* to have him present during any subsequent questioning."

384 U.S. at 474 (emphasis added).

this reason, the Court in *Fare v. Michael C.* stressed that the attorney's *presence* is indispensable to protect the right to be free of compelled self-incrimination:

> the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system established by the Court.

442 U.S. 707, 719 (1979) (internal quotation omitted); *accord Arizona v. Roberson*, 108 S. Ct. at 2098 n.4. The Court has explicitly acknowledged that counsel's presence during custodial interrogation "helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence." *Fare v. Michael C.*, 442 U.S. at 719. It is for precisely these reasons that "*Miranda* warnings" inform a suspect of *both* the right to consult with counsel *and* the right to have counsel present during custodial interrogation.

Accordingly, this Court's consistent understanding of counsel's role in protecting a suspect's rights during custodial interrogation makes clear that the right to counsel cannot be "satisfied" merely by providing a suspect the opportunity to consult with a lawyer prior to renewed, and potentially repeated, police interrogations. A suspect's need for the *presence* of an attorney, which both the Fifth and Sixth Amendments guarantee in the circumstances of this case, does not simply evaporate once the suspect has communicated with a lawyer. That right

remains crucial to protecting a suspect's core right to remain silent during custodial interrogation.[8]

2. The ethical principles governing the legal profession shed considerable light on the critical constitutional inquiry into "what purposes a lawyer can serve at the stage of the proceedings in question, and what assistance he could provide to an accused at that stage." *Patterson v. Illinois*, 487 U.S. at 298. In the present context, the ethical canons and rules strongly reinforce the conclusion that counsel's presence, not mere consultation with counsel prior to interrogation, is essential to safeguard the rights of a suspect who has decided he or she needs the assistance of a lawyer in dealing with the authorities. Since at least 1909, ethical canons have prohibited direct contact between an attorney and an adverse party. Ethical Canon 7-18 of the American Bar Association's Model Code of Professional Responsibility presently sets forth the proper bounds of the relationship between counsel and an adverse party. It provides:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.

[8] This Court's prior rulings would seem to have made clear that *Edwards* established a "bright-line" prohibition of police-initiated interrogation of a defendant in custody who has invoked the right to have counsel present. *See Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) ("courts may admit his response to further questioning *only* on finding that he (a) initiated further discussions with the police, *and* (b) knowingly and intelligently waived the right he had invoked." (emphasis added)). *See also Arizona v. Roberson*, 108 S. Ct. at 2097-2098; *Solem v. Stumes*, 465 U.S. 638, 646 (1984); *Oregon v. Bradshaw*, 462 U.S. at 1042.

EC 7-18, *in* American Bar Foundation Annotated Code of Professional Responsibility 331 (1979). Disciplinary Rule 7-104, which implements this canon, provides:

> (A) During the course of his representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DR 7-104(A)(1), *id.* at 331. These ethical prohibitions were in force in Mississippi at the time of Denham's interrogation of Minnick.[9]

The ethical prohibition against contacts between counsel and an adverse party aims to prevent a lawyer from "nullifying the protection a represented person has achieved by retaining counsel."[10] It is intended "to protect a defendant from the danger of being tricked into giving his case away through opposing counsel's artfully crafted questions." *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983). Counsel will generally know exactly what admissions by an adversary will ensure legal victory, and will often be skilled in the arts of eliciting such admissions. A person unschooled in the law, by contrast, may well have no sense of what facts may be material to his or her legal case, and may therefore unwittingly concede damaging points or omit material points.

[9] Subsequently, Mississippi adopted the Model Rules of Professional Conduct, which do not differ materially on this point. Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[10] Comments to Model Rule 4.2.

Direct contacts between an attorney and an adverse party also threaten the attorney-client relationship and the privilege that surrounds it. The American Bar Association long ago identified this risk when it concluded that the prohibition of contacts between counsel and an opposing party "arise[s] out of the nature of the relation of attorney and client and [is] equally imperative in the right and interest of the adverse party and of his attorney." ABA Committee on Ethics, *Formal Opinion 108* (1934).[11] A nonlawyer may well lack sensitivity to the scope of privileges that protect his communications with counsel. Direct communication between such a person and counsel for that person's adversary could therefore easily lead to invasion of privileged areas. Such communications can also serve to drive a wedge between a party and his or her lawyer. Statements by a party to opposing counsel may effectively commit the party to a particular line of defense, and thus usurp the role of the lawyer in shaping that defense.

The ethical rules are thus designed to exclude contact between a lawyer and an adverse party, not merely to ensure that the adverse party has had the benefit of a lawyer's advice before communicating with the opposing lawyer. The rules recognize that the potential for overreaching inheres in the *interaction* between a skilled attorney and a typically naive opposing party. The rules prohibit such interaction because it simply poses too great a risk to the integrity of the adversary system and the sanctity of the attorney-client relationship.[12]

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[11] This Court has recognized intrusion into the attorney-client relationship diminishes "sound legal advice or advocacy," and in turn undermines "broader public interests in the . . . administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[12] As this Court has repeatedly acknowledged, "partisan advocacy on *both sides* of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S. 648, 655 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975); *Penson v. Ohio*, 109 S. Ct. 346 (1988).

The American Bar Association has recently reaffirmed that these concerns apply with full force in the context of criminal proceedings. *See* ABA House of Delegates Report No. 301 (approved February 12-13, 1990). Indeed, as the Tenth Circuit recently observed, "[i]t is now well settled that DR 7-104(A)(1) applies to criminal prosecutions as well as civil litigation." *United States v. Ryan*, 1990 Westlaw 58119 (10th Cir. May 8, 1990); *see also, e.g., United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988); *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1051 (1981); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 898 (1976); *State v. Yatman*, 320 So.2d 401, 403 (Fla. Dist. Ct. App. 1975); ABA Standards Relating to the Administration of Criminal Justice, Standard 3-4.1 (commentary); American Bar Foundation Annotated Code of Professional Responsibility, at 339 ("There is no doubt that DR 7-104(A)(1) applies to public prosecutors"); Ethics Committee of the American Bar Association, *Informal Opinion 1373* (December 2, 1976).

Courts have quite properly been reluctant to extend DR 7-104(A)(2)'s prohibition to all contacts resulting from official investigation of a criminal suspect prior to formal commencement of adversary proceedings.[13] There

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[13] It may well be consistent with the ethical rule, for example, to permit undercover operations or other direct noncustodial contacts with suspects, even though the State is on notice that the suspect is represented by counsel. Precluding all such contact may "afford too much power to defense lawyers and targets to frustrate investigations that are legitimately in progress as well as those into ongoing or future crimes." Gillers, *Ethical Questions for Prosecutors in Corporate Crime Investigations*, New York Law Journal, Sept. 6, 1988 at 1. Cognizant of this problem, courts have struggled to define the proper scope of DR 7-104(A)(1) to the investigatory stage of criminal proceedings. Compare, e.g., *United States v. Hammad*, 846 F.2d 854, 857 (2d Cir. 1988), *modified* 858 F.2d 834

is no question, however, that *custodial* interrogation of a defendant known to be represented by counsel falls well within the rule's prohibitory scope, even if the interrogation precedes indictment or other formal commencement of the adversary process. *See, e.g., United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973). As these cases make clear, the risk of overreaching is particularly acute in the context of custodial interrogation. The coercive pressures of the custodial setting exacerbate the usual risks inherent in interaction between counsel and an opposing party.[14]

The ethical prohibition applies fully to police officers when they act as agents for prosecuting attorneys. On its face DR 7-104(A)(1) prohibits not only direct communications between an attorney and an adversary party, but also "caus[ing] another to communicate" with an adversary. The Ethics Committee of the American Bar Association long ago concluded that the prohibition governs conduct of law enforcement personnel acting as agents of the prosecution. *See* American Bar Association Ethics Committee, *Formal Opinion 95* (May 3, 1933).[15]

(rule prohibits direct contacts with represnted party before indictment if party knows he or she is subject of investigation) and *United States v. Jamil*, 546 F. Supp. 646, 657 (E.D.N.Y. 1982), with *United States v. Ryan*, 1990 Westlaw 58119 (10th Cir. May 8, 1990) (limited application before indictment); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (same).

[14] Application of the rule in that circumstance does not substantially burden the process of criminal investigation. Law enforcement officials remain free to seek information through proper undercover activity, and to confer with a suspect in the absence of counsel in a noncustodial setting.

[15] Commentators and courts have recognized that a police "interrogator may be considered an agent of the local prosecuting attorney, . . . partly because the dangers that a police interrogator will

The ethical rules applicable to interactions between lawyers or their agents and adverse parties represented by counsel thus make clear that the presence of the adverse party's counsel is essential to prevent overreaching, and that the rule applies with full force in the criminal context. The Fifth and Sixth Amendment rules set forth in *Edwards v. Arizona* and *Michigan v. Jackson* were meant to guard against precisely the kinds of overreaching that the ethical rules also seek to prevent. That the ethical rules recognize a need to prevent direct interaction between lawyers and opposing parties in order to guard against overreaching is powerful evidence that adequate protection of a defendant's Fifth and Sixth Amendment rights requires counsel to be present for any

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threaten or deceive a suspect are obviously at least as great as those that a lawyer will do so." Leubsdorf, *Communicating With Another Lawyer's Client*, 127 U. Pa. L. Rev. 683, 701 (1979). And federal appellate courts have recognized that DR 7-104(A)(1) applies "'to non-attorney law enforcement officers when they act as the alter ego of government prosecutors.'" *United States v. Hammad*, 858 F.2d at 838 (quoting *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983)); *see also United States v. Four Star*, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970).

In the present case, Deputy Denham may have been acting as an agent for Mississippi's prosecuting attorneys. The involvement of prosecutors in Minnick's case at the time of Denham's interrogation of Minnick is apparent. Extradition had been requested, and extradition papers were prepared by members of the district attorney's office in Clarke County, Mississippi. And once counsel for the State was involved in any substantial respect, the ethical prohibitions apply even if counsel did not specifically direct Denham to seek a confession from Minnick outside the presence of Minnick's attorney. Prosecutors are under an ethical obligation to ensure that nonlawyers assisting them in investigation and prosecution respect relevant ethical obligations. *See In re Yacazino*, 494 A.2d 801 (N.J. 1985); *In re Weinberg*, 518 N.E.2d 1037 (Ill. 1988); *In re Fata*, 254 N.Y.S.2d 289, *appeal denied*, 260 N.Y.S.2d 1027 (N.Y. App. Div., 1st Dep't 1964); *In re Brown*, 59 N.E.2d 855 (Ill. 1985). In the present case, this obligation would have required them to ensure that interaction with Minnick did not transgress applicable ethical prohibtions, including DR 7-104.

custodial interrogation occurring after a suspect has asked for counsel.[16]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Petitioner, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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June 28, 1990

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[16] As Justice Stevens has observed:

> [a]n attempt to obtain evidence for use at trial by going behind the back of an adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, . . . notions of fairness that are at least as demanding should also be enforced.

Patterson v. Illinois, 108 S. Ct. at 2400 (Stevens, J., dissenting).